



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Date: NOV 30 2001

Contact Person:

Identification Number:

Contact Number:

Employer Identification Number:

Dear Applicant:

We have considered your application for recognition of exemption from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3). Based on the information submitted, we have concluded that you do not qualify for exemption under that section. We have also separately concluded that you do not qualify for section 509(a)(3) status as a supporting organization. The reasons for our conclusions are set forth below.

Section 501(c)(3)

FACTS

You are a Trust created under a trust document dated [REDACTED]. Your application for exemption was received in our office on [REDACTED]. Your trust document states that the situs of your Trust is the State of [REDACTED] and the Trust shall be governed by the laws of that state. Your trust document's "purpose" clause provides that you were organized for the purpose of establishing an organization which is described in section 501(c)(3) and 509(a)(3) of the Internal Revenue Code.

Section 2.5 of your trust document includes the following language:

In the event that the Trust does not obtain tax exempt status under Sections 501(c)(3) and 509(a)(3) of the Code, the assets of the Trust shall go to the [REDACTED] family, as defined herein, as a contingent remainder.

Section 3.1.2. of your Trust document describes the Trust members of the board as consisting of two members from the class consisting of [REDACTED] and [REDACTED] and of their descendants (the [REDACTED]). Accordingly, this provision of your Trust document defines [REDACTED] for purposes of section 2.5.

You state that in [REDACTED] you had total income of \$[REDACTED]. In [REDACTED] you

distributed \$[REDACTED] to your "primary charity", [REDACTED]. Your organization has been funded, has engaged in planning activities with the primary charity, and has been operating for charitable purposes by distribution of at least one grant to your primary charity in [REDACTED].

LAW

Section 501(a) of the Code provides, in part, that organizations described in section 501(c) are exempt from federal income tax. Section 501(c)(3) describes, in part, an organization which is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, no part of the net earnings of which inures to the benefit of private shareholders or individuals.

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations provides that in order for an organization to be exempt under section 501(c)(3) of the Code it must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational or operational test, it is not exempt.

Section 1.501(c)(3)-1(b)(4) of the regulations provides that an organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed to one or more exempt purposes. However, an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders.

Section 1.501(c)(3)-1(c)(1) of the regulations provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(c)(2) of the regulations provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. The words "private shareholder or individual" is defined in section 1.501(a)-1(c) of the regulations as referring to persons having a personal and private interest in the activities of the organization.

ANALYSIS

We are unable to rule that you qualify for exemption under section 501(c)(3) based on the pertinent language in Article 2.5 of your Trust document providing a "contingent remainder" in favor of the [REDACTED].

Article 2.5 of your Trust document violates the dedication of assets requirement in section 1.501(c)(3)-1(b)(4) of the regulations since the "contingent remainder" in favor of the [REDACTED] will occur if you are not recognized under both section 501(c)(3) and 509(a)(3) of the Code. Thus, you are not organized exclusively for charitable purposes.

Further, the contingent reversion contained in Article 2.5 constitutes evidence of private inurement to the [REDACTED]. Section 1.501(c)(3)-1(c)(2) provides that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. [REDACTED] are both directors of your organization. All of the funds of your organization, the principal and income, can be returned to the [REDACTED] under Article 2.5 by virtue of the contingent reversion. You have not established that your net earnings will not inure in whole or in part to the benefit of private shareholders or individuals. Thus, you are not operated exclusively for charitable purposes.

Section 509(a)(3)

INTRODUCTION

We have also considered your application for supporting organization status (non-private foundation status) under section 509(a)(3) of the Code.

Section 509(a)(3)(A), in effect, describes as a public charity, an organization which is organized and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified organizations described in paragraph (1) and (2). The Trust is asserting qualification under section 509(a)(3) under the "operated in connection with" relationship provided in section 1.509(a)-4(i)(1) of the Income Tax Regulations. The "operated, supervised or controlled by" or the "supervised or controlled in connection with" relationship tests are not asserted by you and are not discussed in this letter. In order to be described as an "operated in connection with" section 509(a)(3) organization, an applicant must satisfy a number of tests including (1) an Integral Part Test, a subpart of which is an attentiveness test, (2) a nondisqualified person control test, and (3) an organization test. You fail these specific tests for the reasons that follow.

ATTENTIVENESS TEST

FACTS

The purpose of your organization is to distribute substantially all of your income to and for the use of various public charities and to help [REDACTED] ([REDACTED]), the "primary charity", carry out its purposes and perform its functions. In a letter dated [REDACTED], you stated that [REDACTED] had a total income of \$[REDACTED] in [REDACTED]. In that same letter you contend that your [REDACTED] contribution of \$[REDACTED] was equal to [REDACTED] percent of [REDACTED]'s total income. In a letter dated [REDACTED], you state that [REDACTED] received \$[REDACTED] in [REDACTED]. You contributed \$[REDACTED] to [REDACTED] in [REDACTED]. Your distributions to the primary charity will not represent a substantial part of the primary charity's total support.

Each year at least [REDACTED] percent of the net income of your organization will be distributed to the primary charity. You represent that your "Board", which includes a member appointed by the primary charity, will meet with the governing board of the primary charity to establish the use of these distributions. In addition, each year [REDACTED] percent of the net income of your organization will be distributed among designated charities listed on Schedule A of your trust document, as determined by your organization. Finally, your organization may make

distributions of net income and of principal to such of the designated charities as your organization may determine.

LAW

Section 1.509(a)-4(i)(3)(iii)(a) of the regulations provides that a supporting organization coming under the "operated in connection with" status must make payments of substantially all of its income to or for the use of one or more publicly supported organizations, and the amount of support received by one or more of such publicly supported organizations is sufficient to assure the attentiveness of such organizations to the operations of the supporting organization. In addition, a substantial amount of the total support of the supporting organization must go to those publicly supported organizations that meet the attentiveness requirement of this subdivision with respect to such supporting organization. Except as provided in (b) of this subdivision, the amount of support received by a publicly supported organization must represent a sufficient part of the organization's total support so as to assure such attentiveness.

ANALYSIS

You will support the "Primary Charity" with a gift of at least [REDACTED] percent of your net income each year. You state that in [REDACTED] you distributed \$[REDACTED] to [REDACTED]. In your Statement of Revenue and Expenses on page 8 of the Form 1023, Application for Exemption, your anticipated total expenditures for [REDACTED] and [REDACTED] are \$[REDACTED] and \$[REDACTED] respectively. However, you fell short in [REDACTED] and contributed about \$[REDACTED] in [REDACTED].

You fail to qualify for public charity status under section 509(a)(3) because you do not meet the attentiveness test provided under section 1.509(a)-4(i)(3)(iii)(a) of the Regulations. In [REDACTED] and [REDACTED] [REDACTED] had income of \$[REDACTED] and at least \$[REDACTED] respectively. The amount of support that you provide to [REDACTED] is far short of the amount necessary to guarantee its attentiveness to your operations.

CONTROL AND ORGANIZATIONAL TESTS:

FACTS

Your letters of [REDACTED] and [REDACTED] explain that you have been funded with cash and property contributions from the settlors in the amount of \$[REDACTED] as of [REDACTED]. The letter of [REDACTED] suggests that your organization is operational as of [REDACTED]. In your letter dated [REDACTED], you state that meetings have been held by telephone without minutes and the discussion in those meetings has been limited to the status of your investments and the amount of money to be distributed to [REDACTED].

Further, your letters of [REDACTED] and [REDACTED] indicate that your organization made a grant to the primary charity of \$[REDACTED] (as noted in the attentiveness test discussion above) in [REDACTED] and \$[REDACTED] in the year [REDACTED].

Disqualified Persons (DPs) within the meaning of section 4946 of the Code exercise control over your organization in a number of different ways. Consider the following items regarding your trust document:

Article 2.2.2. of the Trust document provides that if the Board makes no directions to the "Trustee" as to distributions to the designated charities, the Trustee shall make such distributions as in his "sole and absolute discretion shall determine."

Article 2.4. provides that in the event the Trustee determines, in Trustee's sole and complete discretion, that the Trust fund is too small to economically administer, then, in such event, the Trustee shall distribute the Trust Fund in its entirety outright and free of trust to such organization or organizations as described in Section 170(c)(2) of the Code as the Trustee, in Trustee's total and complete discretion, shall determine.

Article III of your Trust document establishes two members of the Board as consisting of family members of the substantial contributors, who are DPs. One Board member is appointed by the primary charity. The other two members are initially named in Article 3.1.3., but when a vacancy shall occur with respect to these two named members, the vacancy is filled by majority vote of the remaining Board.

Finally, the initial Board of Directors includes [REDACTED] and [REDACTED], who as substantial contributors, are disqualified persons under section 4946(a)(1)(A) of the Code. Also included is [REDACTED], brother of [REDACTED], the attorney who is assisting you in applying for exempt status under section 501(c)(3) of the Code.

LAW

Section 509(a)(3)(C), in effect, provides that public charity status under section 509(a)(3) is precluded for an organization that is controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers and other than one or more organizations described in paragraph (1) and (2).

Section 1.509(a)-4(j)(1) of the regulations provides:

That if a person who is a disqualified person with respect to a supporting organization, such as a substantial contributor to the supporting organization, is appointed or designated as a foundation manager of the supporting organization by a publicly supported beneficiary organization to serve as the representative of such publicly supported organization, then for purposes of this paragraph, such person will be regarded as a disqualified person rather than as a representative of the publicly supported organization.

An organization will be considered "controlled," for purposes of section 509(a)(3), if the disqualified persons, by aggregating their votes or positions of authority, may require such organization to perform any act which significantly affects its operations or may prevent such organization from performing such act. This includes, but is not limited to, the right of a substantial contributor or his spouse to designate annually the recipients, from among the publicly supported organizations of the income attributable to his contribution to the supporting organization.

Thus, if the governing body of a foundation is composed of five trustees, none of whom has veto power over the actions of the foundation, and no more than two trustees are at any time disqualified persons, such foundation will not be considered controlled, directly

or indirectly, by one or more disqualified persons by reason of this fact alone. However, all pertinent facts and circumstances including the nature, diversity, and income yield of an organization's holdings, the length of time particular stocks, securities, or other assets are retained, and its manner of exercising its voting right with respect to stocks in which members of the governing body also have some interest, will be taken into consideration in determining whether a disqualified person does in fact indirectly control an organization.

Section 1.509(a)-4(d)(4)(i) of the regulations provides in part that an organization "operated in connection with" must designate the "specified" supported organizations by name. A supporting organization which has one or more "specified" organizations designated by name in its articles will not be considered as failing the test of being organized for the benefit of "specified" organizations solely because its articles . . . (a) Permit a publicly supported organization which is designated by class or purpose, rather than by name, to be substituted for the publicly supported organization or organizations designated by name in the articles, but only if such substitution is conditioned upon the occurrence of an event which is beyond the control of the supporting organization, such as loss of exemption, substantial failure or abandonment of operations, or dissolution of the publicly supported organization or organizations designated in the articles.

Rev. Rul. 80-207, 1980-2 C.B. 193, held that for purposes of classification as a supporting organization under section 509(a)(3) of the Code, an employee of a corporation owned (over 35 percent) by a substantial contributor, a disqualified person, will be considered under the indirect control of a disqualified person for purposes of the control test,

Rev. Rul. 80-207 provides the following analysis:

Because one of the organization's directors is a disqualified person and neither the disqualified person nor any other director has a veto power over the organization's actions, the organization is not directly controlled by a disqualified person under section 1.509(a)-4(j) of the regulations. However, in determining whether an organization is indirectly controlled by one or more disqualified persons, one circumstance to be considered is whether a disqualified person is in a position to influence the decisions of members of the organization's governing body who are not themselves disqualified persons.

Rev. Rul. 79-197, 1979-1 C.B. 204, holds that a newly created organization did not qualify for status as a supporting organization under section 509(a)(3); rather it was classified as a private foundation. The facts of the Ruling provide, in part, that the organization will pay its future income, until a specific dollar amount has been paid, to specified public charities coming under section 509(a)(1) or (a)(2) of the Code named in its articles of organization. After payment of a specific amount to specified public charities, the organization will dissolve and distribute the remaining assets to such public charities that a contributor to the organization named in the organization's articles of organization selects. Rev. Rul. 79-197 concludes that the subject organization, after payment of the specific amount, was not required by its articles of organization to support public charities that are designated by name. Because the organization was not organized to support specified organizations, it was not a supporting organization.

ANALYSIS

Your Trust document, under Article III, establishes a "Board" consisting of five persons, one of whom is appointed by the primary charity and two of whom are members of the [REDACTED]. In addition to the "Board", the Trust document names a "Trustee" who is a substantial contributor and thus a disqualified person under section 4946(a)(1)(A) of the Code. The "Trustee" is granted significant and substantial authority as to distributions and even as to Trust administration.

As indicated in the facts, Article 2.2.2. of the Trust document provides that if the Board makes no directions to the "Trustee" as to distributions to designated charities, the Trustee shall make such distributions as in his "sole and absolute discretion shall determine." In other words, by not acting, the Board is allowed to turn over control of the Trust to the "Trustee." Since the "Trustee" is a DP, this is a clear violation of the control prohibition under section 1.509(a)-4(j) of the regulations. The same problem appears again in Article 2.2.3. Further examples of the control exercised by the "Trustee" at the expense of the Trust's Board are the powers granted to the "Trustee" under Articles 2.6, 2.11, and 2.12 of the trust document. While the Board would appear to have the authority to override the Trustee with respect to the powers granted in Article 2.6, such power and authority is exercised only if the Board chooses to override the Trustee. The language of Article 2.6., providing that such powers "may" be exercised by the Board, suggests that the powers, as a practical matter, will mostly be exercised by the Trustee.

As set forth in the facts, the Trustee has the power under Article 2.4 to determine, in the Trustee's sole and complete discretion, that if the Trust is too small to economically administer, the Trustee shall distribute the Trust Fund in its entirety outright and free of trust to such organization or organizations as described in section 170(c)(2) as the Trustee shall determine. The power of the Trustee in paragraph 2.4 is a clear and unambiguous violation of the requirements imposed on supporting organizations. There is no proviso as to a Board direction, and the Trustee's discretion as to charitable recipients is not limited to the designated charities. This is not only a violation of the control prohibition by disqualified persons as discussed in the preceding paragraphs (see section 1.509(a)-4(j)(1) of the regulations), but it is a clear violation of the organization test under section 1.509(a)-4(d) of the regulations limiting support to specified designated charities.

This kind and amount of discretion in the Trustee, a disqualified party, is exactly the kind of discretion the Service held was disqualifying in Rev. Rul. 79-197, supra. The facts of that ruling indicate that a newly created organization will pay its future income until a specific amount has been paid to specified organizations that are named in its articles of organization. After the organization has paid out the specific amount to the supported organization, the supporting organization will dissolve and it will distribute its assets to such charitable organizations that a contributor named in its articles selects. Rev. Rul. 79-197 holds that the organization is not required by its articles to be operated to support organizations designated by name. This is precisely the case with your organization by virtue of Article 2.4. You are not required by your articles to support organizations designated by name at any time that the Trustee determines that the trust shall be terminated.

As discussed, the Trustee's powers also violate the section 509(a)(3) organization test. In Quarrie Charitable Fund v. U.S., 603 F.2d 1274 (7th Cir. 1979) the trust document allowed the

trustee to transfer the income to a charity other than the designated charity when, in the trustee's discretion, the charitable uses shall become unnecessary, undesirable, impracticable or no longer adapted to the needs of the public. The court found that such language failed the organizational requirement of section 1.509(a)-4(d)(4)(i)(a) of the regulations. Just as discretion of the trustee was a crucial factor in the court's decision in the Quarrie case, the discretion of the Trustee in article 2.4 violates the organizational test as to your organization.

Section 1.509(a)-4(d)(4)(i)(a) of the regulations allow a change of support of specified designated charities only under certain situations and only when the trust document contains specific language allowing for such discretion. Your Trust contains no such language.

Returning to the control test, disqualified persons are in a position to control the Board, directly or indirectly, for several additional reasons. [REDACTED] is a lawyer and brother to the lawyer who is assisting you and your donors in the exemption application process. This relationship puts him in a position to be under the influence of the [REDACTED] similar to the situation described in Rev. Rul. 80-207, supra. Under the facts, three of the five members of the Board are either disqualified persons or under the influence of disqualified persons. You have proposed amending your bylaws to allow [REDACTED] to appoint three members to your board. However, the language in the amendment (which was never ratified by your board of directors) still allows DPs to control your board.

Finally, under the control test, there is the additional problem of selecting new members of the Board. Under Article 3.1.3., one Board member is appointed by the primary charity and two Board members consist of family members of the [REDACTED]. The other two Board members are named in Article 3.1.3. but when a vacancy shall occur with respect to these two named members, the vacancy is filled by a majority vote of the remaining Board. Since the remaining Board consists of two DP Board members, these DP members may either exercise majority control of the selection of the vacant Board members (if they hold a two to one majority) or they may exercise control by having a veto power in that their two votes offset the two votes of the non-DP Board members. Section 1.509(a)-4(j)(1) of the regulations, supra.

Accordingly, your organization is controlled by disqualified persons within the meaning of section 509(a)(3)(C) of the Code, and fails the section 509(a)(3) organization test.

In summary, your organization fails to qualify under section 509(a)(3) of the Code in that it fails to qualify under the "attentiveness test", the organizational test, and the control test.

Determinations

Accordingly, you do not qualify for exemption as an organization described in section 501(c)(3) of the Code and you must file federal income tax returns. In addition, and separately, you do not qualify as a supporting organization under section 509(a)(3).

Contributions to you are not deductible under section 170 of the Code.

You have the right to protest this ruling if you believe it is incorrect. To protest, you should submit a statement of your views to this office, with a full explanation of your reasoning. This statement, signed by one of your officers, must be submitted within 30 days from the date of this

letter. You also have a right to a conference in this office after your statement is submitted. You must request the conference, if you want one, when you file your protest statement. If you are to be represented by someone who is not one of your officers, that person will need to file a proper power of attorney and otherwise qualify under our Conference and Practices Requirements.

If you do not protest this ruling in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies. Section 7428(b)(2) of the Code provides, in part, that a declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service.

If we do not hear from you within 30 days, this ruling will become final and a copy will be forwarded to the Ohio Tax Exempt and Government Entities (TE/GE) office. Thereafter, any

questions about your federal income tax status should be directed to that office, either by calling 877-829-5500 (a toll free number) or sending correspondence to: Internal Revenue Service, TE/GE Customer Service, P.O. Box 2508, Cincinnati, OH 45201. The appropriate State Officials will be notified of this action in accordance with Code section 6104(c).

When sending additional letters to us with respect to this case, you will expedite their receipt by using the following address:

Internal Revenue Service

1111 Constitution Ave, N.W.
Washington, D.C. 20224

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

(signed) [REDACTED]

[REDACTED]
Manager, Exempt Organizations
Technical Group 4